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In The

Supreme Court of the United States

October Term, 1968

EARL R. HINGER,

Petitioner,

vs.

CITY OF PIQUA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO STATE COURT

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vs.

CITY OF PIQUA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO STATE COURT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of Earl R. Hinger for a writ of certiorari to review a judgment of the Supreme Court of Ohio made and entered by such court on July 3, 1968, a copy of which, together with a copy of the opinion of the intermediate reviewing court, the Court of Appeals of Miami County, Ohio, are hereto appended, respectfully shows to this honorable court the following:

A. OPINIONS OF THE COURTS BELOW

1. No opinion was rendered by the trial court.

2. A copy of the opinion of the Court of Appeals for Miami County in *City of Piqua* v. *Hinger*, 13 Ohio App. 2d 108, is annexed to this petition as Appendix I.

3. A copy of the opinion of the Supreme Court of Ohio in *City of Piqua* v. *Hinger,* 15 Ohio St. 2d 110, is annexed to this petition as Appendix II.

B. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment sought to be reviewed, and the time of its entry, is July 3, 1968.

2. There was no request, and hence no order, for either a rehearing or an extension of time within which to petition for certiorari.

3. The statutory provision believed to confer jurisdiction upon this court to review the judgment of the court below by writ of certiorari is United States Code, Title 28, Section 1257 (3), and Rules of The Supreme Court of the United States, No. 19 (1) (a), to wit, the deciding by the state court of a federal question of substance probably not in accord with the applicable decisions of this Court.

C. QUESTIONS PRESENTED FOR REVIEW

1. Do the *Miranda* rights, as enunciated by the Supreme Court of the United States in *Miranda* v. *Arizona,* 384 U.S. 436, extend to an accused during a custodial interrogation after he has been charged with committing a misdemeanor, specifically, the offense of driving while intoxicated?

2. Following an arrest, are the oral answers to questions from a police officer, the performance of tests such as signing your name, picking up coins, walking a line, touching your nose, having these events filmed by a movie camera, and the taking of a Breathalyzer test, "testimonial"

in character, or "physical evidence", as defined and delineated by the Supreme Court of the United States in *Schmerber* v. *California*, 384, U.S. 757?

D. CONSTITUTIONAL PROVISIONS WHICH THIS CASE INVOLVES.

1. Constitution of the United States, Amendment V, reading in part as follows:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

2. Constitution of the United States, Amendment VI, reading in part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

3. Constitution of the United States, Amendment XIV, reading in part as follows:

> ". . . Nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

E. STATEMENT OF THE CASE

The petitioner was arrested on the night of February 1, 1967, by police officers of the respondent city, while driving his automobile on the city streets. On the scene he was advised that the charge was driving while intoxicated (DWI), and that he would have to leave his car and go into the police station because he was under arrest for DWI.

At the police station, and before being advised of any

of his legal rights, the officers put him through a series of tests, which included walking a line, picking up coins from the floor, touching the nose with eyes closed and bending backward from an erect position with the eyes closed. During these tests the officers filmed the performance with a movie camera. He was then asked a series of questions designed to test his orientation, the answers were recorded on a sheet, and at their request he signed his name thereto. Next he was given a Breathalyzer test (blowing his breath into a machine), which test he was first advised he did not have to take. He then was booked into jail, at which time the desk sergeant advised him he could use the telephone to call an attorney.

Throughout the trial the petitioner's counsel objected to all evidence arising after the arrest, on the basis of denial of constitutional safeguards, as enunciated in *Miranda*. These objections were overruled on the basis of an Ohio Court of Appeals decision, *Columbus* v. *Hayes*, 9 Ohio App. 2d 38, which held that *Miranda* does not apply to misdemeanors. The petitioner was convicted and sentenced, and thereupon appealed.

The Court of Appeals for Miami County reversed the conviction, holding first that Breathalyzer results cannot be used unless there is evidence explaining to the jury how the machine functions and the significance of the readings; and, secondly, that the principles established by this court in *Miranda* do apply in DWI cases. At the request of respondent, this Court of Appeals certified the case to the Supreme Court of Ohio because of the conflict with the decision of another Court of Appeals.

The Supreme Court of Ohio avoided the issue of the conflict, to wit, whether *Miranda* applies to misdemeanors such as DWI, and instead reversed the Court of Appeals for Miami County and upheld petitioner's conviction on the theory that the aforementioned custodial events con-

stituted real or physical evidence, as distinguished from communication or testimony. The court held it to be unprotected from the constitution, under authority of *Schmerber* v. *California*, 384 U.S. 757, and hence did not find *Miranda* in issue.

F. STAGE OF PROCEEDINGS WHEN FEDERAL QUESTION RAISED.

The federal question was first raised in the trial court, the Piqua Municipal Court, in the form of a motion to suppress all evidence gathered after the arrest and before the accused was advised of his constitutional rights. Upon the completion of the cross-examination of the first police officer called, when for the first time it was disclosed the absence of *Miranda* safeguards, there was a motion to suppress, to instruct the jury to disregard the testimony, and to have a continuing objection as to future witnesses, on the strength of *Miranda*, self-incrimination, right to counsel, and due process, as evidenced by the trial record, as follows:

EXCERPTS FROM THE RECORD OF THE MOTION AND ARGUMENT BY DEFENSE COUNSEL TO SUPPRESS EVIDENCE.

[R-52, Line 9]

MR. THORNBURGH: No, but I would like to approach the bench when this witness is excused.

At this time, your Honor, the defense wishes to move to suppress, and have the Court instruct the jury that all the testimony of this witness will be stricken and disregarded concerning anything after the time that the man was placed under arrest until the time he was advised

of his legal rights, which included the movie and the physical tests, Breathalyzer, and the questionnaire.

* * *

[R-53, Line 21]

MR. THORNBURGH: In view of the Miranda decision I would like to first state that I feel that before the Miranda decision on the question of voluntariness, that perhaps a thing such as the Breathalyzer or anything he consented to would be admissible and [R-54] apparently —from what I know, from what he has told me and from what the Officer said, the Breathalyzer, if otherwise admissible by reason of being supported by expert testimony might well be admissible, but as to the movies and the physical tests, I don't feel that he consented to those.

Now since the Miranda decision and this is the key thing, Judge, as I understand the Miranda decision, as soon as a person is placed under arrest and it seems to be pretty clear cut in this case as to when he was placed under arrest, and what he was charged with, you no longer have an investigatory case, you have an accusatory, and at that point this man, before he either testified to anything, gave any written or oral statement or participated in any way in any types of physical tests, particularly when they were given to him after he was already charged and merely as evidence to bolster this case, I think they are clearly inadmissible, and unless he has been first advised of his constitutional rights, first to an attorney and second that anything done and said may be used against him, and by the city's own admission this was not done in this case. And I feel that since the Miranda decision, the movies or anything said or done after the scene where he was placed under arrest at South and Downing Street was done in violation of his constitutional rights and is inadmissible.

* * *

[R-55, Line 5]

MR. THORNBURGH: Well, certainly to due process of law, to self-incrimination. In other words, he was under arrest. He was clearly under custody and as I understand the Miranda and the following decisions, anything that he does, says or is asked to do or perform while in custody, after it has once become accusatory, or here, under arrest, is in violation of his rights unless he's first been advised as to his rights to counsel and that anything he does or says may be used against him. I think it is self-incrimination, right to counsel, due process of law.

* * *

[R-58, Line 2]

MR. THORNBURGH: I presume from this point on, Judge, as each officer is called I can merely renew this motion as to them at the bench, have a similar ruling. I know of no reason why it would be any different with the one exception, and that would be I think the hurdle we just had earlier on the interpretation of the Breathalyzer reading.

* * *

Throughout the trial the accused's objections were overruled. Upon appeal, denial of these federal rights were the basis of the appeal from the outset. The Court of Appeals found the constitutional questions to be raised promptly, in language (see Appendix I) as follows:

> "The defendant made a timely and continuing motion to suppress the evidence presented by prosecution on the ground that the procedure adopted by the police was contrary to the principles enunciated in Miranda vs. Arizona, 384 U.S. 436."

G. ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

So that there is no dispute about the facts and the applicable issues in the case, we first set forth pertinent excerpts from the testimony of the two police officers who testified, as follows:

EXCERPTS FROM THE RECORD OF THE CROSS-EXAMINATION OF OFFICER TAYLOR.

[R-24]

Q Then after the movies and after the physical tests and after the Breathalyzer, then you set down or one of the officers set down and asked questions and put down check marks, is that correct?

A No, sir during —

Q Go on. During what?

A While Officer DeBrosse was getting the Breathalyzer ready, we sat down and I was filling it out during that time.

Q After the movies, though?

A The movies had been taken during these tests.

Q Now you said that you advised this man of his rights. When did you first advise him of his rights?

A In the office there.

Q And what you say is advising him of his rights is that he need not take the Breathalyzer test?

A Yes, sir.

Q That is the only rights you advised him of?

A Yes, sir, I advised him —

Q That was some fifteen minutes or so after you had placed him under arrest?

[R-25]

A Possibly that long.

Q When you placed him under arrest, did you charge him with DWI?

A Yes, sir I did.

Q When you placed him under arrest for DWI out there on Downing Street, did you at that time advise him that he had the right to an attorney?

A No, sir, I did not.

Q Did you at any time that evening advise him of that right?

A Yes, I did.

Q When?

A The same time I advised him as to the test and so forth.

Q That was after the movies?

A It was during the time they were being taken, yes.

Q Do you mean while they were taking movies of him he was being put through certain physical tests?

A Yes.

Q It was during the course of his picking up coins or touching his nose that you told him he had the right to an attorney ?

A No, that was after that.

Q It was after this that you advised him of his right to an attorney?

[R-26]

A Yes, sir.

Q In other words, you had already taken movies, you had already taken physical tests and after you had done all that which is some fifteen minutes after you had placed him under arrest, for the first time you advised him of his right to an attorney?

A Yes, sir.

Q That was after you had placed him under arrest